

2012 APAAC Summer Conference

August 1 - 3, 2012
Westin La Paloma Resort
Tucson, Arizona



JOUSTING WITH DRAGONS (AND DEFENSE EXPERTS)

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JOUSTING WITH DRAGONS (AND DEFENSE EXPERTS)

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Talking Points

- Preparation
 - Learning About Your Expert
 - Pretrial Interview
 - Preparing for Trial
- Organization
- Execution

Preparation





Who are they?

If you know your enemies and know yourself,
you will not be imperiled in a hundred battles;
if you do not know your enemies but do know yourself,
you will win one and lose one;
if you do not know your enemies nor yourself,
you will be imperiled in every single battle.
-Sun Tzu

Experts Come in Two Flavors

- Legitimate
- Not So Much
 - Vested
 - Money
 - Reputation
 - Cause




Don't Take My Word For It: State v. Eduardo Celaya & Firearms "Expert" Ron Scott



Casings Match Bullet From Defendant's Work Truck



ENTER THE "EXPERT"



Ronald H. Scott, M.A., M.S.

Shooting Reconstruction • Firearms • Ballistics



Police Shootings - Firearms - Ballistics - Toolmarks - Shooting
Investigations & Reconstruction - Crime Scenes - Gunshot Distance -
Trajectory - Police Procedures - Hunting & Firearms Safety -
Expert Witness

I am privileged to be one of a handful of persons with combined experience in both forensic and criminal investigations with hands-on involvement in literally thousands of cases from septuple homicides to defective design.

47 total years in ballistics and firearms including 29 years in forensic shooting reconstruction and investigation.

Former Commanding Officer of the Massachusetts State Police Firearms Section and member of the Firearms Review Board for officer involved shootings.

First Clue: Embellished C.V.

Q And you went ahead in that report and you listed out cases that are high profile that you consulted on, right?

A Yes.

Q Now, you listed the Baseway killer, right?

A Yes.

Q You mean Baseline?

A That's Baseline, a typographical error.

Q Okay. And you were asked about Vice President Cheney, Brad Tillman, the Phoenix Sniper, right, you listed all those in your report, right?

A Yes.

Q Okay. You were not retained as an expert in a single one of those cases, were you, sir?

A That is absolutely correct.

Confidential Call From Pat Tillman's Mom Listed On CV As Expert Work!

Q You put your conversation with Ms. Tillman that was strictly confidential, you went ahead and put that in your report, right?

A Yes. I didn't put strictly confidential in this report.

Q I know, that is regrettable. So did you come into open court and testify about it, too, sir?

A I'm sorry. I've let you, Mr. Mosher.

Q Well, let me see if I've got it straight. A question: do I have it right so far?

A Yes.

Q And she did that in a strictly confidential way: do I have it right so far?

A At the time the conversation took place, that was several years ago.

Before the Interview: Information Gathering

- On-line resources (Prosecutor's Encyclopedia)
 - Yahoo Pros-CLE group & NDAA
- Gather transcripts and motions
- Collect referenced literature and build a library
- Contact prosecutors who have cross-examined
 - Style/biases
 - Research relied upon

Other Sources of Information

- Westlaw
- Books/research expert has authored
- Licensing agency
- People in the expert's field









GOOGLE Is Your Friend

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My laboratory is currently pursuing research in two broad areas: psychology and law; and social neuropsychology.

My specific areas of interest within psychology and law are memory, police interrogation practices and coerced confessions, and issues related to sexual consent. I write and serve as an expert witness in these three areas. I have also served as a jury consultant for over 20 years.

Institution
University of Nevada

Current Position
Professor

Highest Degree
Ph.D. in Social Psychology from Ohio State University, 1973

Research Interests

- Memory
- Police Interrogations
- Psychology and Law
- Neuropsychological Assessment
- Social Cognition

Courses Taught

- Teaching the Human Experiment
- Introductory Social Psychology
- Research in Law
- Psychology and Law
- Forensic Neuropsychology and the Law
- Social Influence

"DIPPING" IN THE JURY POOL:

Designing Voir Dire Questions to
Diagnose, Ingratiate, Persuade and Procure
The Jurors you Want

Deborah Davis and William C. Follette

Sierra Trial and Opinion Consultants:
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Reno, Nevada 89509
(775) 323-1233 (phone)
(775) 324-1593 (fax)

Published in the book "The Jury" by Deborah Davis and William C. Follette, 1997

Before the interview

- You must study the literature!!!
- "The jury won't understand it anyway"

CHANCE FAVORS THE PREPARED MIND

1 BY MR. MOSHER:

2 Q Well, when you come into court and testify
3 you often get asked about the statements you've
4 made about cross-race identification in this
5 article. It starts at the bottom of page 31

6 A Actually, you're the first one, and I
7 think you're more prepared than a lot of people
8 that I've confronted in court.

9 Q I appreciate that. Thank you, ma'am.
10

Consider a consulting expert

- Retained [\$\$\$]
- Local crime lab or university/hospital
- Pre-interview assistance
 - Review report
 - Review underlying data
- Attend interview?

The Abusive 4 Year-Old Sibling?!



Biometrics

Dr. Patrick R. Jenson

Dr. Jenson has been funded by the National Science Foundation, the Air Force Office of Scientific Research and the Department of Defense.

Dr. Jenson was a research professor at Western Arizona University, College of Engineering and Natural Sciences, until May of 2008. He joined from the university and has worked at the Air Force Research Laboratory.

Dr. Jenson has addressed hundreds of busy professionals and technical audiences, many times and has testified in civil and criminal cases in courtrooms and before juries over the past twenty years.

Dr. Jenson has co-authored the first textbook published in the United States in forensic biometrics, *Biometric Identification* (2000, 2003) Lavoie and Jenson Publishing. Additionally he serves on the board of *Journal of the International Association of Biometric Identification*.



Dr. Patrick R. Jenson
Forensic Biometrics

Interview Outline

- Pure discovery
- Scoring points
- Laying traps

Pure Discovery

- Qualifications & experience
 - # times testified, defense v. prosecution, topics
 - hourly rate & total bill
 - published, **peer reviewed** literature
- Reports/statements/evidence reviewed
 - Were selections made? By whom?
 - Were they merely supplied facts from lawyers?
- Opinions- nature & scope
 - Supporting literature
- Exhibits/slides

Discovery may score points, too

Preparation lays the foundation

EXAMPLE:

Q: Will you in any of your testimony be relying on studies of witnesses or victims of actual criminal incidents?

A: No.

Q: And are you aware that in the peer reviewed literature there are such studies?

A: Yes.

-pretrial interview of Geoffrey Loftus, eyewitness identification expert

Scoring Points

- The goal is to identify USABLE TRIAL QUESTIONS!
- This is NOT the time to spring your traps

What does this expert believe that HELPS me?

Brainstorm logical concessions

EXAMPLE - "weapon focus" is not blindness!

Q:...[W]ould you agree that the bank teller may remember that the person pointing the gun at them is black for example?

A: The bank teller could remember that. Yes.

Q: They may remember if the person is Hispanic?

A: The teller could remember that yes.

Q: Then they could remember if the person had long hair or short hair or a mustache or a beard, right?

A: It's possible.

-pretrial interview of Linda Demaine, eyewitness identification expert

Stay mobile, move your feet

EXAMPLE:

Q: Of those ten to fifteen times [testifying] in Arizona, have they all been on the behalf of criminal defendants?

A: They have, I should say that I have never been asked by a prosecutor to testify for them. And I would be more than happy to if I were asked.

Q: Is that the answer you give in court when you're asked that question?

A: Yes.

Q: About how many times have you given that answer in court?

A: Probably about two hundred and twenty five.

-pretrial interview of Geoffrey Loftus, eyewitness identification expert



End Zone: No Expert At Trial



- Lawrence Mueller, DNA expert
- Offers the following opinion early in interview:

"[I]n a cold hit ... the standard statistical calculation that's done in most forensic cases is clearly no longer valid. For that reason, NRC-1, back in 1992 made a suggestion that ... the genetic markers ... be split into two categories. The first category would be ... used to search the data base [T]he second set ... could be used to confirm the match.... [Then you would produce statistics ... with that second set of genetic markers only.]"

-pretrial interview of Laurence Mueller, DNA/statistics expert

The Real World Is Our Friend

Q: [P]reviously you said that [random match probability is] not the appropriate method right?

A: ... that's not just my opinion ... everyone who has ever written a scientific paper on this issue has come to that same conclusion.

Q: Well that's interesting, but I guess it depends on how you define the issue. So I want to get a little more specific.

A: Sure.

Q: If I have a profile and I want to know how often I'll run into that profile out there in the real world, then random match probability is the appropriate method to calculate that probability, is it not sir?

A: Right.

Q: Thank you. Ok, so I don't think I have any other questions for today.

After the Interview... Motions

- Ensure complete disclosure
 - Get any slides to be used at trial!
 - Any "papers, documents, photographs, and other tangible objects" to be used at trial (R 15.2(c)(3))
- Preclude certain types of experts/testimony
 - E.g., eyewitness identification experts/innocence project & exonerations (R's 401-403)
 - Preclude opinions about "whether defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." (R 704)



The Game Plan

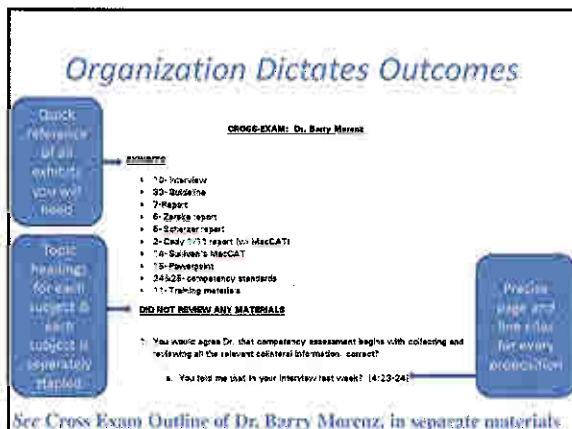
- Outline is divided - fast transitions (chunks)
 - Concessions
 - Importance of history
 - What was reviewed
 - Bias
 - Credibility
 - Improbability
- **Exact page & line cites for all supported questions**
- Begin and end strong (scripted)

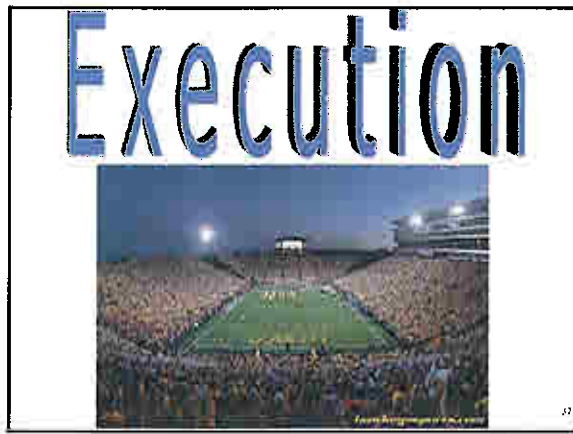
Ref	Questions	Notes
Pg/Ln	History/Review	
9/397	Is history important to you?	
10/412	Would you agree that while history doesn't necessarily change what you do, it may guide what you pay more attention to?	
13/539	Do you agree that, as a pathologist, the more relevant information you know, the better off you are?	
13/544	Would you agree with me that "Forensic pathology does not operate in a vacuum."?	
	What materials did you review in this case?	

Tips


- Short questions – one fact per question
- Remember your case theory
- General questions then case-specific
- Don't chase rabbit trails
- Consider using modifying words:
 - Likely
 - Possible
 - Is there a chance that
 - Do you have any reason to doubt that
- Tell me everything that goes against your opinion.
- Would it be important . . .

History	
We talked about blood being found on V1's vaginal swab, are you also aware that V1's DNA was found on the defendant's penis?	
Are you aware that the defendant's DNA was found in V2's underwear?	
Are you aware that the defendant has admitted examining V2's vagina to make sure she had not been molested?	
Are you aware that a pornographic DVD was found under V2's mattress with both her DNA and the defendant's DNA on it?	
Would that be important history for you to know?	






Opening Drive



- Scripted
- Consider using *secret weapon*
 - *Secret weapons* help you no matter answer
- Examples of *secret weapons*:
 - Roy Malpass - Do you see this man in the courtroom?
 - Robert Gale - Have you ever seen TCE?
 - Missy Arrington - Did you not pay attention or not care?

Is THIS twelve pounds?

State v. Carlos Barreras-Ratcliff & Dr. Patrick Hannon



Patience, Pace, & Tone

- Don't rush the kill
 - Easier to go from nice to nasty
 - Can't really go back
- Gain concessions up front
- Eliminate the escape routes before you spring the trap

A Few Good Men

- Order that Santiago was not to be touched?
- Was Lt. Kendrick clear on order?
- Any chance that Lt. Kendrick ignored?
- Any chance that Lt. Kendrick forgot?
- Any chance Kendrick thought, "The old man is wrong?"
- Any chance platoon ignored Lt. Kendrick?
- "We follow orders or people die."

A Few Good Men

- If you gave an order that Santiago wasn't to be touched, and your orders are always followed, why would Santiago be in danger?



Maintain CONTROL



Q So you didn't bring anything with you to show the jury what you saw under the comparison microscope in this case, do I have that right, sir?

A Well, the photos, I was analyzing the photos at the same time as I looked in the -- are you talking about my own photos?

Q You didn't bring anything with you to show what you saw under the comparison microscope when you did your work in this case, did you, sir?

A No, I didn't.

Pitting Experts Against Each Other

Issue	Question	Notes
	1. What is the issue?	
	2. What are the facts?	
	3. What are the legal issues?	
	4. What are the arguments?	

Remember....

- Their opinions can be a sword or a shield... for YOU
- Rely on logic and common sense (you inhabit the *real world*)
- Research, research, research
- Tone depends on expert!
- And KNOW WHEN TO STOP...
- Don't ask ultimate questions – argue them

What do you have to ask?

- Q: You testified that when he was in your business it was dark outside, is that correct?
- A: Yes.
- Q: And this was on January 26th?
- A: Yes.
- In January, it gets dark by 5:30, doesn't it?
- Yes.
- And it was stormy, so it could have been as early as 5:15?
- Yes.

What do you have to ask?

- And leaving your business at 5:15 or 5:30 would give you plenty of time to get to 7th Street and Thunderbird, even if you walked, wouldn't it?
- Yes.
- So the defendant doesn't actually have an alibi, does he?

Expert Witness - Types of Cross

- Qualifications
- Professional bias
- Faulty/inadequate basis for opinion
- Impeachment
- Learned treatises/research

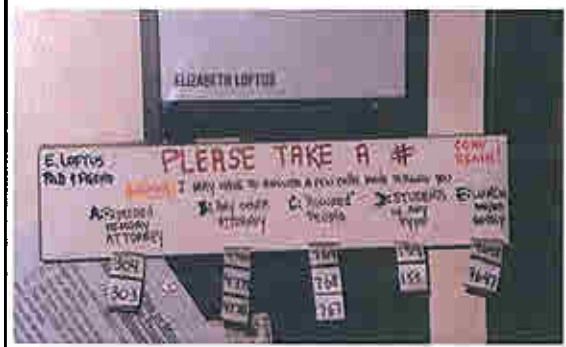
Qualifications:

Examples of "Expert" Opinions

- One can tell how many times a female has had sex – vagina becomes “a well-worn trail”
- Rape results in medical findings “because when I force my wife, you can see injuries.”
- At age 45, the vagina becomes “pretty much useless”.
- Purpose of labia: Prevents urine from splashing against toilet

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Professional Bias



"The [U.S.] is really pretty schizophrenic right now . . . Given this schizophrenia and these hysterical attitudes about childhood sexuality, it's going to be difficult for paedophiles to appear more positive, to start saying they're not exploiters of children, that they love children, the sexual part included, even if it's a minor part. If they made such statements, they would be arrested.

What we see going on in the [U.S.] is the most vitriolic and virulent anti-sexuality I know of in our history. It may take people being arrested. Revolutionaries have always risked arrest."

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Exposing The Bias: Built On Preparation & The Interview

Q Okay. So back when you were a police officer, sir, you used to go into court and testify all the time, in fact, hundreds of times, that you could link a particular gun to particular bullets that were in evidence in those cases, didn't you?

A Yes. With the underlying principle being there must be sufficient markings.

Q Nowadays, though, you think it is inappropriate to ever say a gun fired a bullet to the exclusion of all other guns; isn't that correct?

A I agree with that.

• Cross examination of Ron Scott, State v. Celaya

Inadequate Basis For Opinion

- As a medical doctor important to have complete history?
- Know all the relevant facts before treating?
- Patients do not always give complete history?
- Did not read police report?
- Did not talk to police?
- Did not talk to treating physicians?

Expert's "Holistic Approach"

Expert compared what police officer defendant said on radio to what GPS showed

Prosecutor: By the way, do you speak cop?

Ford: Not fluently.

Prosecutor: The defendant is 2 Adam 77; is he not? Is that your understanding?

Ford: To be honest, I couldn't indicate either way. I wouldn't know enough to determine what that meant.

Research-Based Cross

- Confront with research-backed statement:
 "Would you agree with me that medical findings (injuries) in cases involving sexual abuse of children is the exception, rather than the rule?"
 If yes, concession.
 If no, bring out the research.

	One of the articles you listed was by Dr. Charles Johnson entitled "Sexual Abuse in Children."	
	Dr. Johnson is a Prof. of Pediatrics at Ohio State Univ.	
	Please look at page 6 of Dr. Johnson's article.	
	Take a look at the section I have highlighted for you. Would you agree with me that it says:	
Johnson	"[O]nly 5% of children who are evaluated for suspected abuse have abnormal medical findings . . ."	PPT

Johnson - 8

- "[O]nly 5% of children who are evaluated for suspected abuse have abnormal medical findings . . ."

Make The Literature Work For You!

22 Q That's what we were talking about in Bash?
 23 Now, we're talking about convenience store clerks
 24 picking customers out of line-ups, right?
 25 A Right.
 1 Q Do you ever go into convenience stores?
 2 A Well, sure.
 3 Q Do you find that when you buy something at
 4 a convenience store that the clerk, from your
 5 perspective as a social psychologist and expert,
 6 have you noticed that the clerk finds that to be a
 7 real meaningful interaction?
 8 A Probably on the average they don't. I
 9 think you can make them that way if you pay enough
 10 attention to them and talk to them very much, but
 11 on the average, probably not.

- Cross examination of Deborah Davis, *State v. Whitehead*

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CROSS-EXAM: Dr. Barry Morenz

EXHIBITS

- 10- Interview
- 30- Guideline
- 7-Report
- 6- Zarske report
- 5- Scherzer report
- 2- Cady 1/11 report (w/ MacCAT)
- 14- Sullivan's MacCAT
- 15- Powerpoint
- 24&25- competency standards
- 11- Training materials

DID NOT REVIEW ANY MATERIALS

1. You would agree Dr. that competency assessment begins with collecting and reviewing all the relevant collateral information, correct?
 - a. You told me that in your interview last week? [4:23-24]
 - b. You are familiar with the American Academy of Psychiatry and the Law? [2:6-8]
 - c. In fact, years ago, you began attending meetings of that organization to learn about how to conduct evaluations of CST, right? [2:6-8]
 - d. You would agree that Am Academy of Psychiatry and the Law is an authoritative body in your field?
 - e. And the American Academy of Psychiatry and the Law published a Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial in 2007, correct?
 - f. Have you ever looked at that Guideline?
 - g. You would agree that the Guideline states that psychiatrists conducting a competency evaluation should review relevant discovery materials

including police reports, as well as interrogations, correct? [Guideline at S32]

2. In this case you were not provided with a single police report?
3. You were not provided with a single transcript of any witness statement?
 - a. That includes the transcript or video recording of Defendant's statement to police back in August of 2010?
4. You were not provided with the video recording of Dr. Steven Pitt's January 2012 interview of the defendant?
5. You were not provided with the video recording of Dr. Steven Pitt's April 2012 interview of the defendant?
 - a. So you have never watched any of the 3 video recorded interviews with the Defendant in this case which span the period between August 2010 and April 2012?
6. You also were not provided with the transcripts of any of these interviews, including Dr. Pitt's two interviews of the defendant?
7. In this case, the defense attorney simply made a decision as to which items you would look at, isn't that true?
 - a. And what he decided to provide for your review was the items listed 1-8 at pp1-2 of your report, correct?
 - i. Those 8 items are:
 1. Indictment
 2. GJT
 3. Defense expert Cady 1/2011 report
 4. Defense expert Potts 10/2010 report
 5. Defense expert Zarkse 12/2011 report
 6. Defense expert Scherzer 12/2011 report
 7. Notes from defense mitigation specialist Ty Mayberry
 8. Correspondence between Curley and family

- b. You would agree you didn't ask for anything other than what Mr. Bransky sent you, correct?
- c. You never reviewed Scott Curley's school, counseling, or medical records, correct?
- d. Are you aware that the AAPL Guideline suggests that psychiatrists personally review important collateral information rather than merely relying on other clinician's summaries? [Guideline at S38]

TESTING

8. You gave Scott Curley one test, the SIRS, isn't that true?
 - a. And the SIRS, which stands for Structured Interview of Reported Symptoms, is actually a test which is designed to test malingering, basically exaggerating or faking, correct?
 - i. Which version of the SIRS did you administer?
 1. Is there more than one SIRS?
 2. In fact, isn't the current SIRS actually the SIRS-2?
 3. You didn't use this one, did you?
 4. Would you agree if you are going to present a test in court you should at least bother to know what the current test is?
 - b. You didn't find any indication that Scott Curley was exaggerating or faking with you, correct?
 - c. You were however provided with Dr. Zarske's report, which indicates that Scott Curley had previously taken a SIRS and had elevated scores on that previous test, correct?
 - i. [Zarske= Exhibit 6 if needed]
 - d. But other than testing Scott Curley for exaggerating or faking, using the SIRS, you did NOT give him any other test, correct?
9. And in your interview, when I asked you about which measures or tests you use in your assessments, you answered that sometimes you administer the TOM, sometimes the MMPI, remember that? 10:7-9
 - a. Describe the TOM
 - i. What does TOM stand for?
 - b. That is neuropsychological measure, correct?
 - c. Have you seen the test manual for the TOM?

- d. In that manual, have you seen the “User Qualifications” section?
- e. Do you agree that section describes administration of the test under the supervision of a trained psychologist?
- f. Describe the MMPI?
 - i. What does it stand for?
 - ii. What are the minimum requirements in the user manual for the MMPI?
 - iii. Would you agree it requires a graduate level course in psychological testing?
 - iv. You don’t have that, do you sir?

Mac-CAT-CA

10. Have you heard of the MacArthur Competence Assessment Tool, Criminal Adjudication, also known as the MacCAT-CA?
11. Would you agree the MacCAT-CA is a structured, validated test which assesses a person's competency to stand trial?
 - a. [If he waffles- Guideline at S42]
12. Now, even though you didn't administer this test yourself, were you aware that in this case, Dr. Daniel Cady administered this test to Scott Curley in January 2011?
 - a. EXHIBIT2- CADY 1/2011 REPORT
 - i. Did you review this report as part of your work in this case?
 - ii. ADMIT
13. Were you aware that in this case, Dr. James Sullivan administered this test to Scott Curley on March 31st, 2012?
 - a. [If he is unaware]: Let me ask you this: You wrote an addendum to your report on June 4th, 2012, correct?
 - b. So by the time you wrote your addendum, dated 6/4, Dr. Sullivan's report regarding competency, describing his Mac-CAT-CA results, dated 5/24/2012, had already been provided to the defense? [BS on Sullivan report shows 5/29 disclosure]
 - c. But you never asked to see the results of Scott Curley's MacCAT-CA tests, correct?
 - i. By results I mean his ACTUAL ANSWERS?
 - ii. Do his ACTUAL ANSWERS to this COMPETENCY ASSESSMENT TEST matter to you at all?
 - iii. What if Scott Curley was able to answer every question on that test, and pass it with flying colors, isn't that relevant to you at all in trying to figure out if he is competent?

14. If Scott passed the MacCAT-CA with flying colors TWICE, in January 2011 and March 2012, that would be something you should at least CONSIDER in assessing his competency, isn't it?

- a. Two experts administer the same measure endorsed by the Am Acad of Psych and the Law as the single best measure, they give the test 14 months apart, and SC's results are nearly identical: Wouldn't that be important to account for as a scientist? [Sullivan=38 out of 44; Cady = 39 out of 44]
- b. And these results across 14 months also say something about Mr. Curley's stability over time?

15. Let's talk specifically about how Scott Curley answered some of the questions on the MacCAT-CA, and I want to focus on the Appreciation questions.

16. Let me start by asking you about Appreciation Item 17.

- a. EXHIBIT14- Sullivan's MacCAT showing page w/ item 17 [OR POWERPOINT EXHIBIT 15]

17. Are you aware that Appreciation Item 17 is the point in this test, where the questions change from being about a hypothetical, Fred's case, to being about the defendant himself?

18. In other words, are you aware that the first 16 questions have to do with the hypothetical case of a person named Fred?

- a. Are you aware items 1-8 relate to Understanding, and they are all about Fred's case?
- b. Items 9-16 relate to Reasoning and they are also all about Fred's case?
- c. But in Item 17 the focus shifts from Fred's case to the defendant's case?

19. Item 17: [READ ALOUD] Do you agree this question is relevant to the competency inquiry?

- a. Do you know how Scott Curley answered this question?

- b. If Scott Curley answered the question in the following manner, would that be relevant to you in assessing his competency?

- i. [READ CURLEY'S ANSWER ALOUD]

20. [Same questions for items 18-22]

THE BLACK BOX

21. Do you agree that we should be able to look at your report and figure out why it is that you are saying Scott Curley is incompetent?

a. For example, you agree with the AAPL Guideline, Exhibit 30, at pS49 that:

“Competence reports should **go beyond describing signs and symptoms of mental impairment** and should discuss **how** those signs and symptoms affect functional abilities relevant to the legal construct of competence. **The heart of a competence report is a description of the defendant’s abilities and deficits concerning the tasks that the defendant must perform during a criminal defense.**” Guideline at S49

22. You agree that everyone with schizophrenia is not incompetent? [20:13-14]

23. Everyone with delusions is not incompetent?

24. So other than telling us that Scott Curley has delusions, where is it in your report that you explain your basis for concluding that he is incompetent?

a. [Use report – 7 and addendum- 8/have him point out specific sections]

25. Dr., you would agree that some people with delusions are competent, right?

26. So the inquiry doesn’t end with whether Mr. Curley has delusions, right? We need to know more?

27. Specifically, what we need to know is THIS, right?
[EXHIBIT- Competency Standard]24= moody; 25= statute

28. So tell us **precisely** what questions you asked and what answers Scott Curley gave that tell you he not only has delusions but is incompetent?

a. The fact is, Dr. Morenz, you CANNOT tell us exactly what questions you asked and what answers SC gave that tell you he is incompetent? [25:18-22]

i. You admitted in your interview that you might not have any record of things you discussed with Scott Curley even relating directly to

his competency? [48:4-10]

- ii. The only record you have of your interview is your notes and your report, correct?
 - iii. At your interview you admitted that you couldn't tell us where in the notes we would even look to try and find where you discussed SC's ability to assist his lawyer? 52:24-53:4
- b. If you cant tell us about specific questions and answers, then how is your work different from the proverbial black box?
- c. How can anyone check your work, to know how you did it and to be sure you did it right?
- 1. You would agree, then your work is not reproducible?
 - 2. You would agree then that your work is not subject to peer review?

PSYCHOTHERAPY

29. Would you agree with the AAPL Guideline that:

“Assessing and documenting a defendant’s functional status usually requires asking **specific questions that systematically explore the defendant’s general knowledge about criminal proceedings, his understanding of matters specific to his legal case, and his ability to relate to defense counsel.**” Guideline at S34.

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- a. So both Dr. Pitt and Dr. Sullivan made it possible to check their work?
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- a. As part of that teaching, you have prepared materials, right?
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i. [EXHIBIT 7] In that report, can you show me where your reasoning was clearly documented?

ii. Then you wrote a 6/4/2012 addendum, right?

iii. [EXHIBIT 8] Can you show me where in that addendum your reasoning is clearly documented?

iv. So your reasoning is that SC’s delusions cause him to be unable to assist his lawyer with a reasonable degree of rational understanding, correct?

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AXIS II/ASPD

39. In your report, you provide no Axis II diagnosis for Scott Curley, correct?

40. What is Axis II?

- a. Would you agree that Axis II would include Antisocial Personality Disorder?
- b. Would you agree that at last week's interview you told me that Scott Curley did not demonstrate features of an antisocial personality? [28:8-12]
- c. What are the diagnostic criteria for ASPD?

41. But among the limited materials you reviewed in this case was Dr. Zarske's report, didn't you? [Exhibit 6]

- a. Dr. Zarske stated on p15 of his report that "This individual possesses personality dimensions associated with violence potential (i.e., suicidal behavior and aggression toward others)", correct?
- b. Personality dimensions associated with violence and aggression toward others would certainly seem to be features of an antisocial personality, wouldn't they?

42. And you also reviewed Dr. Anna Scherzer's report, correct? EXHIBIT 5

- a. Dr. Scherzer actually reported an Axis II diagnosis of ASPD, correct? [P59]
- b. Do you have any reason to doubt her competence as an expert?
- c. So you just ignored what she had to say?

CROSS-EXAM: Dr. Barry Morenz

EXHIBITS

- 10- Interview
- 30- Guideline
- 7-Report
- 6- Zarske report
- 5- Scherzer report
- 2- Cady 1/11 report (w/ MacCAT)
- 14- Sullivan's MacCAT
- 15- Powerpoint
- 24&25- competency standards
- 11- Training materials

DID NOT REVIEW ANY MATERIALS

1. You would agree Dr. that competency assessment begins with collecting and reviewing all the relevant collateral information, correct?
 - a. You told me that in your interview last week? [4:23-24]
 - b. You are familiar with the American Academy of Psychiatry and the Law? [2:6-8]
 - c. In fact, years ago, you began attending meetings of that organization to learn about how to conduct evaluations of CST, right? [2:6-8]
 - d. You would agree that Am Academy of Psychiatry and the Law is an authoritative body in your field?
 - e. And the American Academy of Psychiatry and the Law published a Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial in 2007, correct?
 - f. Have you ever looked at that Guideline?
 - g. You would agree that the Guideline states that psychiatrists conducting a competency evaluation should review relevant discovery materials

including police reports, as well as interrogations, correct? [Guideline at S32]

2. In this case you were not provided with a single police report?
3. You were not provided with a single transcript of any witness statement?
 - a. That includes the transcript or video recording of Defendant's statement to police back in August of 2010?
4. You were not provided with the video recording of Dr. Steven Pitt's January 2012 interview of the defendant?
5. You were not provided with the video recording of Dr. Steven Pitt's April 2012 interview of the defendant?
 - a. So you have never watched any of the 3 video recorded interviews with the Defendant in this case which span the period between August 2010 and April 2012?
6. You also were not provided with the transcripts of any of these interviews, including Dr. Pitt's two interviews of the defendant?
7. In this case, the defense attorney simply made a decision as to which items you would look at, isn't that true?
 - a. And what he decided to provide for your review was the items listed 1-8 at pp1-2 of your report, correct?
 - i. Those 8 items are:
 1. Indictment
 2. GJT
 3. Defense expert Cady 1/2011 report
 4. Defense expert Potts 10/2010 report
 5. Defense expert Zarkse 12/2011 report
 6. Defense expert Scherzer 12/2011 report
 7. Notes from defense mitigation specialist Ty Mayberry
 8. Correspondence between Curley and family

- b. You would agree you didn't ask for anything other than what Mr. Bransky sent you, correct?
- c. You never reviewed Scott Curley's school, counseling, or medical records, correct?
- d. Are you aware that the AAPL Guideline suggests that psychiatrists personally review important collateral information rather than merely relying on other clinician's summaries? [Guideline at S38]

TESTING

8. You gave Scott Curley one test, the SIRS, isn't that true?
 - a. And the SIRS, which stands for Structured Interview of Reported Symptoms, is actually a test which is designed to test malingering, basically exaggerating or faking, correct?
 - i. Which version of the SIRS did you administer?
 1. Is there more than one SIRS?
 2. In fact, isn't the current SIRS actually the SIRS-2?
 3. You didn't use this one, did you?
 4. Would you agree if you are going to present a test in court you should at least bother to know what the current test is?
 - b. You didn't find any indication that Scott Curley was exaggerating or faking with you, correct?
 - c. You were however provided with Dr. Zarske's report, which indicates that Scott Curley had previously taken a SIRS and had elevated scores on that previous test, correct?
 - i. [Zarske= Exhibit 6 if needed]
 - d. But other than testing Scott Curley for exaggerating or faking, using the SIRS, you did NOT give him any other test, correct?
9. And in your interview, when I asked you about which measures or tests you use in your assessments, you answered that sometimes you administer the TOM, sometimes the MMPI, remember that? 10:7-9
 - a. Describe the TOM
 - i. What does TOM stand for?
 - b. That is neuropsychological measure, correct?
 - c. Have you seen the test manual for the TOM?

- d. In that manual, have you seen the “User Qualifications” section?
- e. Do you agree that section describes administration of the test under the supervision of a trained psychologist?
- f. Describe the MMPI?
 - i. What does it stand for?
 - ii. What are the minimum requirements in the user manual for the MMPI?
 - iii. Would you agree it requires a graduate level course in psychological testing?
 - iv. You don't have that, do you sir?

Mac-CAT-CA

10. Have you heard of the MacArthur Competence Assessment Tool, Criminal Adjudication, also known as the MacCAT-CA?
11. Would you agree the MacCAT-CA is a structured, validated test which assesses a person's competency to stand trial?
 - a. [If he waffles- Guideline at S42]
12. Now, even though you didn't administer this test yourself, were you aware that in this case, Dr. Daniel Cady administered this test to Scott Curley in January 2011?
 - a. EXHIBIT2- CADY 1/2011 REPORT
 - i. Did you review this report as part of your work in this case?
 - ii. ADMIT
13. Were you aware that in this case, Dr. James Sullivan administered this test to Scott Curley on March 31st, 2012?
 - a. [If he is unaware]: Let me ask you this: You wrote an addendum to your report on June 4th, 2012, correct?
 - b. So by the time you wrote your addendum, dated 6/4, Dr. Sullivan's report regarding competency, describing his Mac-CAT-CA results, dated 5/24/2012, had already been provided to the defense? [BS on Sullivan report shows 5/29 disclosure]
 - c. But you never asked to see the results of Scott Curley's MacCAT-CA tests, correct?
 - i. By results I mean his ACTUAL ANSWERS?
 - ii. Do his ACTUAL ANSWERS to this COMPETENCY ASSESSMENT TEST matter to you at all?
 - iii. What if Scott Curley was able to answer every question on that test, and pass it with flying colors, isn't that relevant to you at all in trying to figure out if he is competent?

14. If Scott passed the MacCAT-CA with flying colors TWICE, in January 2011 and March 2012, that would be something you should at least CONSIDER in assessing his competency, isn't it?
- a. Two experts administer the same measure endorsed by the Am Acad of Psych and the Law as the single best measure, they give the test 14 months apart, and SC's results are nearly identical: Wouldn't that be important to account for as a scientist? [Sullivan=38 out of 44; Cady = 39 out of 44]
 - b. And these results across 14 months also say something about Mr. Curley's stability over time?
15. Let's talk specifically about how Scott Curley answered some of the questions on the MacCAT-CA, and I want to focus on the Appreciation questions.
16. Let me start by asking you about Appreciation Item 17.
- a. EXHIBIT14- Sullivan's MacCAT showing page w/ item 17 [OR POWERPOINT EXHIBIT 15]
17. Are you aware that Appreciation Item 17 is the point in this test, where the questions change from being about a hypothetical, Fred's case, to being about the defendant himself?
18. In other words, are you aware that the first 16 questions have to do with the hypothetical case of a person named Fred?
- a. Are you aware items 1-8 relate to Understanding, and they are all about Fred's case?
 - b. Items 9-16 relate to Reasoning and they are also all about Fred's case?
 - c. But in Item 17 the focus shifts from Fred's case to the defendant's case?
19. Item 17: [READ ALOUD] Do you agree this question is relevant to the competency inquiry?
- a. Do you know how Scott Curley answered this question?

- b. If Scott Curley answered the question in the following manner, would that be relevant to you in assessing his competency?

- i. [READ CURLEY'S ANSWER ALOUD]

20. [Same questions for items 18-22]

THE BLACK BOX

21. Do you agree that we should be able to look at your report and figure out why it is that you are saying Scott Curley is incompetent?

a. For example, you agree with the AAPL Guideline, Exhibit 30, at pS49 that:

“Competence reports should **go beyond describing signs and symptoms of mental impairment** and should discuss **how** those signs and symptoms affect functional abilities relevant to the legal construct of competence. **The heart of a competence report is a description of the defendant’s abilities and deficits concerning the tasks that the defendant must perform during a criminal defense.**” Guideline at S49

22. You agree that everyone with schizophrenia is not incompetent? [20:13-14]

23. Everyone with delusions is not incompetent?

24. So other than telling us that Scott Curley has delusions, where is it in your report that you explain your basis for concluding that he is incompetent?

a. [Use report – 7 and addendum- 8/have him point out specific sections]

25. Dr., you would agree that some people with delusions are competent, right?

26. So the inquiry doesn't end with whether Mr. Curley has delusions, right? We need to know more?

27. Specifically, what we need to know is THIS, right?

[EXHIBIT- Competency Standard]24= moody; 25= statute

28. So tell us **precisely** what questions you asked and what answers Scott Curley gave that tell you he not only has delusions but is incompetent?

a. The fact is, Dr. Morenz, you CANNOT tell us exactly what questions you asked and what answers SC gave that tell you he is incompetent? [25:18-22]

i. You admitted in your interview that you might not have any record of things you discussed with Scott Curley even relating directly to

his competency? [48:4-10]

- ii. The only record you have of your interview is your notes and your report, correct?
 - iii. At your interview you admitted that you couldn't tell us where in the notes we would even look to try and find where you discussed SC's ability to assist his lawyer? 52:24-53:4
- b. If you cant tell us about specific questions and answers, then how is your work different from the proverbial black box?
- c. How can anyone check your work, to know how you did it and to be sure you did it right?
- 1. You would agree, then your work is not reproducible?
 - 2. You would agree then that your work is not subject to peer review?

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